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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LEO EUGENE STRANGE, Appellant.	)	2 CA-CR 2011-0061 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101179001

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED

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K E L L Y, Judge.

¶1 Following a jury trial, Eugene Strange was convicted of armed robbery, robbery, and aggravated assault with a deadly weapon. He was sentenced to concurrent terms of imprisonment, the longest of which is fourteen years. On appeal, he argues the trial court erred by denying his motion to suppress his confession and by denying his motion to sever the charges. Finding no error, we affirm.

Background

¶2 In reviewing the denial of a motion to suppress evidence, we consider only the facts presented at the suppression hearing, viewing them in the light most favorable to sustaining the trial court's ruling. *State v. Wyman*, 197 Ariz. 10, ¶ 2, 3 P.3d 392, 394 (App. 2000). In March 2010, Strange robbed two different banks in Tucson. After being advised of his legal rights, Strange was interrogated by law enforcement officers, and he confessed to the crimes.

¶3 Strange moved to suppress the confession, but the trial court denied his motion, suppressing only the statements he made to the officers before being advised of his rights. Strange also moved to sever the counts in the indictment, a motion he renewed during trial. The court denied the motion on both occasions. He was convicted and sentenced as described above. This appeal followed.

Discussion

¶4 Strange first argues the trial court erred by denying his motion to suppress his confession, claiming he had invoked his right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966), and his confession was not voluntary. We review for an abuse of

discretion the court's denial of a motion to suppress a confession. *State v. Ellison*, 213 Ariz. 116, ¶ 25, 140 P.3d 899, 909 (2006). The inquiry into an alleged violation of *Miranda* is distinct from the inquiry into the voluntariness of the statement. *State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983). We review any legal conclusions de novo. *State v. Newell*, 212 Ariz. 389, ¶ 27, 132 P.3d 833, 841 (2006).

***Miranda* Warnings**

¶5 During an interview with law enforcement, and after receiving warnings pursuant to *Miranda*, Strange said: "I probably should be speaking with a lawyer." The interviewing officer reminded Strange that he did have that choice and that he had previously been advised of his rights. Strange then asked a question about a piece of evidence that he had been shown. The interview continued, and Strange confessed to the crimes.

¶6 Under *Miranda*, a person who is questioned in custody must be advised of his right to remain silent. 384 U.S. at 467-68. Thereafter, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-74. A defendant need not recite any specific language in order to invoke his Fifth Amendment right to remain silent. *United States v. Ramirez*, 79 F.3d 298, 304 (2d Cir. 1996). The test for whether a person's invocation of the right to remain silent is sufficiently clear is whether a "'reasonable police officer in the circumstances'" would understand it to be such. *State v. Strayhand*, 184 Ariz. 571, 585, 911 P.2d 577, 591 (App. 1995), *quoting Davis v. United States*, 512 U.S. 452, 459 (1994).

¶7 Strange first contends his statement was an unequivocal invocation of his right to counsel. He challenges Arizona and federal precedent to the contrary. And among the cases he asserts were wrongly decided are cases decided by our supreme court. *See State v. Prince*, 204 Ariz. 156, 61 P.3d 450 (2003); *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994). However, we are bound by the decisions of our supreme court, and we "do not have the authority to modify or disregard [its] rulings."[1] *State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004). Because Strange concedes his statement would not be found an unequivocal assertion of his right to counsel under current Arizona case law, we cannot conclude the trial court abused its discretion by denying his motion to suppress on this ground.

¶8 In the alternative, Strange asserts the interviewing officer was required to clarify whether his statement was intended to invoke his right to counsel. Citing *State v. Finehout*, 136 Ariz. 226, 229, 665 P.2d 570, 573 (1983), and *State v. Gay*, 214 Ariz. 214, ¶ 36, 150 P.3d 787, 797 (App. 2007), Strange maintains that once he said, "I probably should be speaking with a lawyer," officers were permitted to ask questions only to clarify whether he was invoking his right to counsel.[2]

¶9 But after speaking about a lawyer, Strange initiated conversation by asking about the evidence before him. "When an accused invokes the *Miranda* right to counsel,

[1]Because this case is controlled by Arizona law, we need not analyze the foreign law Strange also cites.

[2]In response to the state's argument, Strange further suggests the case law is conflicting and requests that we resolve this conflict. But, because Strange initiated conversation, as described below, we need not reach this issue.

police must cease questioning and may not further question the accused . . . 'unless the accused himself initiates further communication, exchanges, or conversations with the police.'" *Gay*, 214 Ariz. 214, ¶ 32, 150 P.3d at 796, *quoting Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Thus, even assuming, without deciding, that such clarification would have been required, once Strange initiated the subsequent communication, a prior invocation of the right to counsel would not have been grounds for excluding the resulting confession. *See id.* Consequently, the trial court did not err by denying Strange's motion to suppress on this ground.

Voluntariness of Confession

¶10 Strange next argues his confession should have been suppressed because it was involuntary due to an officer's offer of help. During the interview, an officer said to him: "[J]ust help yourself by helping us." And Strange contends his subsequent confession was "a product of the agent's assertion."

¶11 For a confession to be admissible, it must have been made voluntarily. A.R.S. § 13-3988. If the confession resulted from impermissible or coercive conduct by the police, it is deemed involuntary. *State v. Tapia*, 159 Ariz. 284, 288, 767 P.2d 5, 9 (1988). A promise of help or leniency, such as Strange alleges here, is coercive. *Ellison*, 213 Ariz. 116, ¶ 30, 140 P.3d at 910. But, an "[a]ppellant must also show that he actually relied on the existence of a promise for that promise to render his confession involuntary." *Tapia*, 159 Ariz. at 290, 767 P.2d at 11. Strange does not even argue, let alone demonstrate, that he so relied. Therefore, we find no error with the trial court's denial of his motion to suppress.

Motion to Sever

¶12 Strange finally argues the trial court erred by denying his motion to sever the counts arising from the two robberies. We review for an abuse of discretion a court's denial of a motion to sever. *State v. Garland*, 191 Ariz. 213, ¶ 9, 953 P.2d 1266, 1269 (App. 1998).

¶13 A trial court's failure to sever counts requires reversal only when a defendant demonstrates the error caused him prejudice. *See State v. Stuard*, 176 Ariz. 589, 596-97, 863 P.2d 881, 888-89 (1993). This burden is not met when the evidence from one set of charges would be admissible at trial on the other set. *State v. Atwood*, 171 Ariz. 576, 612, 832 P.2d 593, 629 (1992), *disapproved of on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001). Further, as Strange acknowledges, a "'defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt.'" *State v. Johnson*, 212 Ariz. 425, ¶ 13, 133 P.3d 735, 740 (2006), *quoting Prince*, 204 Ariz. 156, ¶ 17, 61 P.3d at 454. Strange concedes "[t]he trial court gave such an instruction" but, nevertheless, maintains he was prejudiced. He asserts that case law to the contrary "fails to take into account the effect of multiple similar offenses on the jury" because the offenses serve as "impermissible 'other act' evidence." This is, in fact, precisely the problem our supreme court intended to remedy by requiring the jury instructions on the burden of proof and separate nature of the counts. *See, e.g., id.* And, as explained above, we are bound by the decisions of our

supreme court. *Smyers*, 207 Ariz. 314, n.4, 86 P.3d at 374 n.4. Thus, the trial court did not abuse its discretion by denying Strange's motion to sever.

Disposition

¶14 We affirm Strange's convictions and sentences as imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge